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IN THE

Supreme Court of the United States

October Term 1983

Roy E. Davis, Individually and
Trading as Roy E. Davis, Seafood,

Petitioner

V.

UNITED STATES OF AMERICA and its
Agency the United States Air Force

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
of Virginia,

Respondents

and

HAMPTON ROADS SANITATION DISTRICT,

Third-Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Does the decision of the United States Supreme Court in Middlesex County Sewerage Authority, et al v. National Sea Clammers Association, et al, eliminating private causes of action under the Federal Water Pollution Control Act, also preclude recovery for damages under the Federal Tort Claims Act, when the damages arise from water pollution caused by the United States?

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Constitutional Citation:

U.S. Const. Art. III, § 2 3

Legislative History:

United States Code Congressional and Administrative News, 92nd Congress, Second Session, Volume 2, Legislative History, pages 3746 and 3747 17

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No.

ROY E. DAVIS, Individually and
Trading as Roy E. Davis, Seafood,
Petitioner

v.

UNITED STATES OF AMERICA and its
Agency the United States Air Force

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
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Respondents

and

HAMPTON ROADS SANITATION DISTRICT,
Third-Party Defendant.

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FOR THE FOURTH CIRCUIT

DECISIONS BELOW

The United States District Court for

the Eastern District of Virginia, on April 13, 1982, found for the respondent the United States. (App. p. 22a)

On appeal the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the Eastern District of Virginia. (App. p. 26a)

QUESTION PRESENTED

Does the decision of the United States Supreme Court in Middlesex County Sewerage Authority, et al v. National Sea Clammers Association, et al, eliminating private causes of action under the Federal Water Pollution Control Act, also preclude recovery for damages under the Federal Tort Claims Act, when the damages arise from water pollution caused by the United States?

GROUNDS FOR JURISDICTION

The petitioners petition the Supreme

Court of the United States for a Petition for a Writ of Certiorari to review the decisions of the United States Court of Appeals for the Fourth Circuit, which decision was handed down the 14th day of September, 1983.

Jurisdiction of the Federal Courts is based upon the Federal Tort Claims Act, 23 U.S.C. 1346(b) and 28 U.S.C. 2671, et seq. Venue is based upon 28 U.S.C. 1391 (e).

Jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals for the Fourth Circuit is based upon 28 U.S.C. § 1254(1) and on the U.S. Const., Art. III, § 2, cl. 2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves are as

follows:

28 U.S.C. § 1331

28 U.S.C. § 1346(b)

28 U.S.C. § 2674

28 U.S.C. § 2680

33 U.S.C. § 1365(e)

Title 21, Sec. 218, Code of Va., 1950, as amended

Title 21, sec. 223, Code of Va., 1950, as amended

Title 62.1, Sec. 44.3(6), Code of Va., 1950, as amended

Title 62.1, Sec. 44.5, Code of Va., 1950, as amended

STATEMENT OF THE CASE

Petitioner Roy E. Davis (hereinafter "Davis") is engaged in the seafood business in Back River, a tributary of the Chesapeake Bay, and does business as Roy E. Davis Seafood.

His principal business is the purchasing of polluted clams, pursuant to Commonwealth of Virginia supervision, trans-

planting said clams from polluted waters to Back River, where the clams are cleaned; and resale of the clams to the public. Normal cleansing time is about 15 days.

Respondent United States, through its instrumentality, Langley Air Force Base (hereinafter "Langley"), fronts on said River. Further, said river is bordered by the City of Hampton (hereinafter "Hampton").

The United States operates a sewage collection system and pumping facilities at Langley. Sewage and wastes are pumped into sewage lines owned and controlled by Hampton Roads Sanitation District (hereinafter "HRSD"). However, on at least 9 separate occasions between February 25, 1979 and September 6, 1979, untreated sewage in excess of 17 million gallons was dumped into the Back River by

the United States. As a result of the discharges, Back River was closed by the Virginia State Health Department until such time as the colliform bacterial level was reduced to limits determined by the department to be safe.

On June 22, 1979, the Environmental Protection Agency found that Langley had violated the Federal Water Pollution Control Act (hereinafter "FWPCA") by discharging untreated sewage into the Back River, and ordered compliance with the act. However, some incidents of dumping occurred after that finding and warning.

Between January 1, 1979 and July 31, 1980, more than 400,000 gallons of raw sewage were discharged into the Back River, on at least 28 separate occasions, by Hampton. The discharges by Hampton, in conjunction with the discharges by the

United States, created the pollution problem aforementioned.

As a result of such actions, Petitioner was caused substantial damage and compelled to close his business.

On September 13, 1979, Davis submitted his claim for damages to the United States. On May 6, 1980, the claim was rejected by the United States and Davis was advised of his right to sue under the Federal Tort Claims Act.

Further, Davis complied with the notice requirements of the FWPCA with regard to the United States and Hampton, and notified the City of Hampton, in accordance with Virginia law, that it was illegally discharging pollutants into a navigable waterway.

On October 27, 1980, Davis instituted action in the United States District Court for the Eastern District of Vir-

ginia against the United States and the City of Hampton, alleging that untreated sewage flowing from Langley and Hampton contaminated the shellfishing grounds in which Davis conducted his business, causing said shellfishing grounds to be closed, and resulting in, substantial damage.

Respondent United States admitted jurisdiction under the Federal Tort Claims Act (App. p. 10a) and elected to file a third-party complaint against Hampton Roads Sanitation District, a political subdivision of the Commonwealth of Virginia, and the agency responsible for accepting and treating sewage from all of the localities on the Peninsula including Hampton, and Langley.

Additionally, each of the respondents filed motions to dismiss under Rule 12, and the City of Hampton moved to dismiss

under Rule 19 for failure to join essential parties, asserting that the non-joinder of all persons bordering Back River constituted a violation of Rule 19 for which the suit should be dismissed as to them.

Each of respondents motions were responded to in timely fashion. On March 22, 1982, the United States moved to dismiss on new jurisdictional grounds, alleging the absence of tort jurisdiction and citing in support thereof the decision of the United States Supreme Court in Middlesex County Sewerage Authority et. al. v. National Sea Clammers Association et. al., 453 U. S. 1 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981).

By Memorandum Order, dated April 13, 1982, the District Court granted the motion of the United States and dismissed the suit on the grounds of lack of jur-

isdiction. (App. p. 31a) The action against the City of Hampton was likewise dismissed, without prejudice, the pendent jurisdiction supporting that action having been destroyed upon dismissal of the suit against the United States.

By Per Curian decision of September 14, 1983, the Fourth Circuit Court of Appeals affirmed the District Court. (App. p. 38a).

ARGUMENT

THE DECISION IN MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. V. NATIONAL SEA CLAMMERS ASSOCIATION ET AL., WHILE ELIMINATING PRIVATE CAUSES OF ACTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT, HAS NO SUCH ADVERSE EFFECT ON A CLAIM FOR DAMAGES RESULTING FROM POLLUTION AND INSTITUTED AGAINST THE OFFENDING PARTY UNDER THE FEDERAL TORT CLAIMS ACT.

Counsel for Petitioner will concede

that the effect of Middlesex County Sewerage Authority, et al. v. National Sea Clammers Association, et al, 453 U. S. 1, 69 L.Ed. 2d. 435 101 S. Ct. 2615, (1981), other than enforcement suits, under the Federal Water Pollution Control Act (herinafter the FWPCA), 33 U.S.C. 1251 et seq., and to eliminate the concept of a federal common law of nuisance as a jurisdictional basis for individual citizens suits complaining of water pollution. Reviewing the legislative history of the FWPCA, the Court discussed the opportunity of citizens to enforce pollution standards under Sections 1365(a) and (b) of the act, and then quoted itself, stating:

> "...it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading

> others into it...In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." Middlesex County, 453 US at 14, 69 L.Ed 2d. at 447, 101 S. Ct. at 2623.

It is unreasonable and tortured construction to suggest that an admonition against inclusion of unintended remedies be extended to bar separate, independent and long-standing remedies for damages caused by the tortious misconduct of the government. Legitimate judicial concern about a plethora of "citizen" suits should not result in a loss of individual rights under the Federal Tort Claims Act, whether those claims arise from the negligent operation of a mail truck, or negligent pollution of a privately leased shellfishing ground.

The same principal was enunciated in

Hough v. Marsh, 557 F. Supp 74 (D. Mass-1982) by Judge Nelson, who declined to dismiss a suit against the U. S. Army Corps of Engineers on Middlesex grounds, finding instead that independent bases of jurisdiction were provided under 28 U. S. C. 1331 (a) and the Administrative Procedures Act (5 U. S. C. 701 et seq.).

A fair construction of the complaint (App. p. 2a) can only lead to the conclusion that Roy Davis seeks to recover for damages caused by pollution and that the pollution was caused by the negligence of the United States and the City of Hampton. While the actions of the United States and Hampton may violate the FWPCA, it is the physical pollution of the water, not breach of an administrative standard, for which Davis seeks compensation. There is not even a suggestion that Davis relies upon a

"Federal common law of nuisance", City of Milwaukee v. Illinois, 451 US 304, 68 L. Ed. 2d. 114, 101 S. Ct. 1784 (1981). The interpretation of the Complaint by the Court of Appeals ignores the plain language of the pleading.

It should be remembered that the Federal Tort Claim Act was asserted, in Middlesex, as a basis for jurisdiction, but suit was not instituted in timely fashion. Accordingly, that jurisdictional basis was rejected by the Court of Appeals, National Sea Clammers Association v. City of New York, 616 F 2d 1222 (1980), and never considered by the Supreme Court. However, it is reasonable to construe the Federal Tort Claims Act as somewhat more than an umbrella for nuisance claims. There are certainly no exceptions in 28 U.S.C. § 2680 which would constitute a bar to tort action

against the Federal sovereign for negligent pollution, and the resultant damage.

It is difficult to ignore the language of 33 U.S.C. S 1365 (e) which states:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

The decision of the District Court creates an environmental Catch-22; on the one hand, the Court rules that the FWPCA provides citizens an exclusive statuatory basis upon which to institute action for the purpose of terminating pollution; on the other hand, citizens who are damaged by pollution are barred from instituting suit for damages arising from the tortious misconduct of the polluter, in this case the Federal

sovereign and a municipal government.

Title 33, United States Code, § 1365 (e) and the legislative history of the FWPCA specifically rebut that proposition.

In discussing the savings clause of the FWPCA, 33 U.S.C. § 1365(e), the report of the Senate Public Works Committee states as follows:

> "Section 505 (33 U.S.C. § 1365) would provide that a citizen enforcement action might be brought against an individual or a government agency. As recognized under section 313 of the bill, Federal facilities generate considerable water pollution. Since some Federal agencies such as the Department of Defense have failed in abating pollution and in requesting appropriations to develop control measures, citizens can seek, through the courts, to expedite the government performance specifically directed under section 313... It should be noted,

> however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for pollution damages."
>
> United States Code Congressional and Administrative News, 92nd Congress, Second Session, Volume 2, Legislative History, pages 3746 and 3747.

To suggest that the Supreme Court intended to narrow the scope of the FWPCA and constructively limit the number of suits arising thereunder is an acceptable position. To suggest that Middlesex has meaning beyond that proposition is to read far more into Middlesex than the specific language of the Justices would suggest or permit.

It is respectfully submitted that ample reason is provided in the opinions

of the District and Circuit Courts to support the granting of a Writ of Certiorari to Roy E. Davis, under the guideline set forth in Rule 17.1(c), Rules of the Supreme Court. Further, comparable suits are presently docketed in Michigan (Frank J. Kelley et al v. U. S., G-83-630, W. D. Michigan) and Florida (Dickerson, Inc. v. American Electric Corporation and United States, 82-244-CIV-JB, M. D. Fla.). It is reasonable to assume that the issue raised herein will not be settled until the principles enunciated in Middlesex are clarified.

CONCLUSION

For all of the foregoing reasons, Petitioner Roy E. Davis, by counsel, respectfully prays that a Writ of Certiorari issue forth.

Respectfully submitted,

JAMES E. BRADBERRY

D. WAYNE MOORE

MOORE, MOORE & BRADBERRY

13185 Warwick Boulevard

Newport News, Virginia

23602

Counsel for Petitioner

88-1241

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

ROY E. DAVIS, Individually and
Trading as ROY E. DAVIS SEAFOOD,

Plaintiff,

v.

UNITED STATES OF AMERICA and
its Agency the UNITED STATES
AIR FORCE

SERVE: Justin W. Williams
United States Attorney
for the EASTERN DISTRICT
OF VIRGINIA
United States Attorney's Office
Post Office Building
Norfolk, Virginia

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
of Virginia

SERVE: O. Wendell White
City Manager
City Hall
Hampton, Virginia,

Defendants.

COMPLAINT

1. This action arises under the

Federal Tort Claims Act, 28 USC § 1346

(b), and 28 USC § 2671 et seq.; the Federal Water Pollution Control Act, 33 USC § 1365 (e); and pendent jurisdiction over claims arising under 21-287, 62.1-44.3(6) and 62.1-44.5, Code of Virginia, 1950, as amended.

2. The Plaintiff resides in the above-captioned judicial district, and all acts and/or omissions herein complained of have occurred in the above-captioned judicial district.

COUNT ONE
CLAIM AGAINST THE FEDERAL SOVEREIGN

3. At all times herein mentioned, the Defendant United States operated a sewage collection system and pumping facilities at Langley Air Force Base in Hampton, Virginia.

4. Your Plaintiff operates a seafood business in Back River, a tributory of the Chesapeake Bay, and the said Langley Air Force Base fronts on said

river.

5. Plaintiff is in the business of purchasing polluted clams pursuant to Commonwealth of Virginia supervision and transplanting the clams from polluted water to Back River where the clams are cleaned and resold to the public. The required cleansing period is fifteen (15) days.

6. Plaintiff has leased shellfish ground from the Commonwealth of Virginia and uses the river bottom of Back River for transplanting the clams for cleansing. Plaintiff has been operating the business for at least seven (7) years.

7. Back River has been closed by the State Health Department to the harvesting of shellfish due to the discharge of untreated sewage into Back River. Defendant United States did, on at least nine (9) occasions between February 25, 1979

and September 6, 1979, dump 17,819,000 gallons of raw untreated sewage into the Back River.

8. That the discharge of sewage comes from pumping station number 1370 located on Langley Air Force Base and operated by defendant United States.

9. That such discharge caused the Back River to be closed, for the cleansing and harvesting of clams, thereby causing Plaintiff to have to close his business, as a result of which Plaintiff has been damaged.

10. That Langley Air Force Base is a military base and as such is subject to the requirements of the Federal Water Pollution Control Act (hereinafter FWPCA), as amended, 33 USC § 1251-1376; that in an effort to stop such discharge of sewage, Plaintiff filed suit in this District under the caption Roy E. Davis t/a

Roy E. Davis Seafood v. United States Air Force C.A. No. 79-113-NN. That on June 22, 1979, the Environmental Protection Agency, pursuant to its statutory authority under FWPCS, found that Langley Air Force Base has violated FWPCA and ordered compliance with FWPCA.

11. That Defendant United States owes a duty to the Plaintiff not to injure him by the wrongful discharge of sewage into a navigable river in violation of the FWPCA; and that as a direct and proximate result of the wrongful conduct of Defendant United States, your Plaintiff has been forced to close his business.

12. That as a direct result of the closing of the Back River, resulting from the discharge of raw sewage by Defendant United States, your Plaintiff was forced to purchase clams from other

sources at a cost in excess of his normal cost; that Plaintiff was forced to borrow money he would not have had to borrow except for the disruption of his business due to the closure of Back River; that Plaintiff suffered loss of sales due to the closure of the river; that Plaintiff's business was severely disrupted due to the closure of the river; that Plaintiff lost customers due to the closure of the river; that Plaintiff lost profits due to the closure of the river; that Plaintiff will continue to suffer damages each time the Back River is closed to the harvesting of shellfish, if Defendant United States' wrongful conduct persists, and that the Defendent United States was duly notified by claim of September 13, 1979.

13. That on September 13, 1979, Plaintiff submitted his claim for dama-

ges to Defendant United States, but on May 6, 1980, the claim was rejected by Defendant United States.

COUNT TWO
CLAIM AGAINST THE MUNICIPAL SOVEREIGN

14. The allegation of Paragraphs 4, 5, and 6 are incorporated herein, by reference, as if fully set out.

15. At all times mentioned herein, Defendant City of Hampton (hereinafter Hampton) operated a sewerage collection system and pumping facilities.

16. That the Back River, in which Plaintiff conducts his clam cleansing and harvesting business, has been closed by the Virginia State Health Department to the harvesting of shellfish because of the frequent discharge of raw sewerage into the waters thereof; that Defendant Hampton has, on at lease twenty-eight (28) occasions, between January 1, 1979 and July 31, 1980 discharged in ex-

cess of 400,000 gallons of raw sewerage into the Back River.

17. That such discharge caused the Back River to be closed, for the cleansing and harvesting of clams, thereby causing Plaintiff to have to close his business, as a result of which Plaintiff has been damaged.

18. That Defendant Hampton, a political subdivision of the Commonwealth of Virginia, is subject to the requirements of the Federal Water Pollution Control Act, 33 USC S 1251 et seq. and 62.1-44.5, Code of Virginia, as amended, prohibiting the discharge of pollutants into navigable waters such as the Back River.

19. That Defendant Hampton owes a duty to the Plaintiff not to injure him by the wrongful discharge of sewage into a navigable waterway in violation of the Federal Water Pollution Control Act and

the Code of Virginia; that as a direct and proximate result of the wrongful conduct of Defendant Hampton, your Plaintiff has been forced to close his business on numerous occasions and has suffered serious financial loss.

20. That as a direct result of the closing of the Back River resulting from the discharge of raw sewage by Defendant your Plaintiff has been forced to purchase clams from other sources at a cost in excess of his normal cost; that Plaintiff has been forced to borrow money he would not have had to borrow except for the disruption of his business due to the closure of Back River; that Plaintiff suffered loss of sales due to the closure of the river; that Plaintiff's business was severely disrupted, business and customers lost, expenses increased, and Plaintiff will continue to suffer addi-

tional damages every time that Back River is closed to the harvest of shellfish due to the wrongful conduct of the Defendant.

21. That notice of the injury caused Plaintiff the actions of Defendant Hampton was, pursuant to 8.01-222, Code of Virginia, sent, by certified mail, to the Hampton City Manager on October 22, 1980.

DAMAGES

22. That as a result of the wrongful and unlawful conduct of the defendants, jointly and severally, in violation of federal and state statutes, your Plaintiff has been damaged in the sum of THREE HUNDRED TWENTY-ONE THOUSAND EIGHT HUNDRED FIFTY-TWO and 00/100ths DOLLARS ($321,852.00), for which he seeks recovery herein.

PRAYER

23. As a result of the foregoing, your Plaintiff respectfully prays for the following relief:

a) Recovery from the defendants, jointly and severally, in the sum of THREE HUNDRED TWENTY-ONE THOUSAND EIGHT HUNDRED FIFTY-TWO and 00/100ths DOLLARS ($321,852.00), as compensation for damages caused by defendant's willful and wrongful conduct;

b) Recovery of attorney's fees, expert witness fees and Court costs, as provided for in 33 USC S 1365(d); and

c) Issuance of a permanent injunction against each defendant, barring any further discharge of raw sewerage into the waters of the Back River.

DATED: October 27, 1980.

Roy E. Davis

/s/ By: Wayne Moore

/s/ Wayne Moore

D. Wayne Moore
Counsel for Plaintiff
MOORE, MOORE & BRADBERRY
13185 Warwick Boulevard
Newport News, Virginia 23602

C E R T I F I C A T E

I certify that a true copy of the foregoing Complaint was this 27 day of October, 1980, mailed by registered U.S. mail, postage prepaid, to the Attorney General of the United States, U. S. Justice Department, Washington, D. C. in accordance with Rule 4(d), Federal Rules of Civil Procedure.

/s/ Wayne Moore
D. Wayne Moore

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

ROY E. DAVIS,

Plaintiff,

v. CIVIL ACTION NO.
80-202-NN

UNITED STATES OF AMERICA,
UNITED STATES AIR FORCE,
AND THE CITY OF HAMPTON,

Defendant.

A N S W E R

THE UNITED STATES AND THE UNITED STATES AIR FORCE, by and through the United States Attorney, for the Eastern District of Virginia, answer the complaint of plaintiff Roy E. Davis as follows:

1. Admits that jurisdiction in his case exists under the Federal Tort Claims Act but deny all other allegations of paragraph 1 of the Complaint.

2. Admits the allegations of paragraph 2 of the Complaint.

COUNT ONE
CLAIM AGAINST THE FEDERAL SOVEREIGN

3. Admit the allegations of paragraph 3 of the Complaint.

4. Admit the allegations of paragraph 4 of the Complaint.

5. The defendant United States admits that the plaintiff is in the business of purchasing clams, transplanting them in the Back River, harvesting them and then selling them to the public. The defendant United States is without sufficient information to form an opinion with regard to the other allegations of paragraph 3, and accordingly, denies said allegations.

6. The defendant admits the allegations of paragraph 6, except that the defendant is without knowledge with regard to the length of time the plaintiff has been in the business of clam pro-

cessing and accordingly denies allegations with regard to the length of time.

7. The defendant United States admits that in the year 1979 the Back River was closed to the harvesting of shellfish on several occasions by the Virginia State Health Department. The defendant United States admits that on at least nine (9) occasions between February 25, 1979 and September 6, 1979 overflows of sewage occurred near pump station 1370 at Langley Air Force Base, Virginia which may have resulted in quantities of partially treated sewage entering the Back River. The defendant United States denies the other allegations of paragraph 7.

8. Admit that occasional and intermittent discharges of less than fully treated sewage occurred at the Building

1370 pumping station on Langley Air Force Base and that said pumping station is operated by the defendant United States Air Force, an agency of the defendant the United States. Defendants aver additionally that discharges of untreated or inadequately treated sewage occurred at other locations under the control of persons other than the federal defendants.

9. Deny the allegations of paragraph 9 of the Complaint.

10. The defendant United States admits that Langley Air Force Base is subject to the Federal Water Pollutions Control Act and that plaintiff filed a suit in this district, Civil Action No. 79-113-NN, under such act. The defendant denies any knowledge of the motive which prompted the filing of said suit. Defendant admits that the Environmental Protection Agency issued an order on June

1, 1979 but denies the effect of that order. Defendant avers further that the Environmental Protection Agency issued an Order on December 1, 1980 under its authority allowing Langley until July 1, 1983 to come into full compliance with the provisions of the Clean Water Act (previously known as the Federal Water Pollution Control Act.)

11. Deny the allegations of paragraph 11 of the Complaint.

12. Admit that the defendant United States was notified by claim of September 13, 1979, but deny knowledge of the nature, cause or extent of any damages allegedly suffered by plaintiff. Defendant also denies that any damages was caused by the action of the defendant United States.

13. Admit the allegations of paragraph 13 of the Complaint.

COUNT TWO
CLAIM AGAINST THE MUNICIPAL SOVEREIGN

14-21. Federal defendants pray that they be excused from answering paragraphs 14-21 of the Complaint which pertain solely to the defendant City of Hampton. Federal defendants do not possess knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 14-21.

DAMAGES

22. Deny the allegation of damages contained in paragraph 23 of the Complaint.

PRAYER

23. Deny the allegations contained in paragraph 23 of the Complaint.

Affirmative Defenses

1. The plaintiff has failed to join other known and potential polluters of the Back River, including both point and non-point sources of pollution, and has

failed to join the Hampton Roads Sanitation District, an agency known to the plaintiff, whose acts and powers directly and indirectly control the amount of pollutants that are discharged into the Back River. The failure to join these indespensible parties will result in unjust and incomplete adjudication of the allegations in the complaint.

2. The plaintiff assumed the risk of injury by instituting a business to plant and harvest clams in the Back River, a river portions of which have been permanently closed for years because of high levels of fecal coliform and other pollutants and other portions of which have been periodically closed temporarily, because the river becomes periodically inundated with high levels of fecal coliform and other pollutants during periods of moderate to heavy rain fall.

3. The plaintiff's own negligence contributed to the alleged injury in that the plaintiff failed to plant and harvest his clams in a manner that would insure that they would not die during periods when the Back River was closed on account of the presence of fecal coliform and other pollutants.

4. The plaintiff's own negligence contributed to the alleged injury in that the plaintiff, along with others, discharged pollutants into the Back River which elevated the level of fecal coliform and other pollutants in the river.

5. The Federal defendant's alleged actions and omissions in establishing the collection facilities for sewage at Langley Air Force Base constitute acts and omissions of an employee of the government, exercising due care, in the execution of a statute or regulation and

is based on the exercise and performance and/or failure to exercise or perform discretionary functions and duties on the part of a Federal agency.

6. The alleged pollution of the Back River resulted from rain fall, in the Newport News-Hampton, Virginia area, which was an act of God and was the proximate and superceding cause of the alleged injury complained of.

7. The plaintiff is restricted to recovering attorney's fees under the Tort Claim Act and is barred from recovering attorney's fees under Title 33, United States Code, by the doctrine of Res Judicata.

8. The plaintiff is barred from bringing an action under 33 U.S.C. 1365 by the doctrine of Res Judicata.

WHEREFORE the defendant United States

petition this Honorable Court to dismiss the complaint with prejudice and cost.

UNITED STATES OF AMERICA

/s/ By: John F. Kane
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

ROY E. DAVIS, Individually and
Trading as ROY E. DAVIS SEAFOOD,

Plaintiff,

v. CIVIL ACTION FILE
NO. 80-202-NN

UNITED STATES OF AMERICA and
its Agency the UNITED STATES
AIR FORCE,

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth of
Virginia,

Defendants.

MOTION TO AMEND COMPLAINT

COMES NOW Plaintiff, by counsel, and pursuant to Rule 15, Federal Rules of Civil Procedure, moves to amend paragraph one (1) of the Complaint by adding the following language: "Further, plaintiff asserts federal question jurisdiction under 28 USC 1331."

ROY E. DAVIS

/s/ By: Wayne Moore
Of Counsel

/s/ Wayne Moore
Counsel for Plaintiff
13185 Warwick Boulevard
Newport News, Virginia 23602

C E R T I F I C A T E

I hereby certify that a true and correct copy of the foregoing Motion to Amend Complaint was this 24th day of June, 1981 mailed to all counsel of record.

/s/ Wayne Moore
MOORE, MOORE & BRADBERRY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

ROY E. DAVIS, Individually
and Trading as ROY E. DAVIS
SEAFOOD,

Plaintiff,

v. CIVIL ACTION NO:
80-202-NN

UNITED STATES OF AMERICA and
its Agency the UNITED STATES
AIR FORCE,

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
of Virginia,

Defendants.

MOTION TO DISMISS

Comes now the United States by its attorney and moves this Honorable Court to dismiss the complaint on the grounds that the Court lacks jurisdiction over the subject matter, that the complaint fails to state a claim upon which relief has failed to join indispensable parties, for the reasons more fully set forth in

the attached Memorandum In Support of the Motion to Dismiss.

Respectfully submitted,

ELSIE L. MUNSELL
UNITED STATES ATTORNEY

/s/ By: John F. Kane
John F. Kane
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

ROY E. DAVIS, Individually
and Trading as ROY E. DAVIS
SEAFOOD,

Plaintiff,

v. CIVIL ACTION NO.:
80-202-NN

UNITED STATES OF AMERICA and
its Agency the UNITED STATES
AIR FORCE,

and

THE CITY OF HAMPTON, a political
subdivision of the Commonwealth
of Virginia,

Defendants.

RESPONSE TO MOTION TO DISMISS

COMES NOW Plaintiff, ROY E. DAVIS, by counsel, and says that this Honorable Court has jurisdiction over the subject matter of Plaintiff's complaint under the provisions of the Federal Tort Claims Act; that the Plaintiff has asserted a claim upon which relief can be granted in the form of monetary damages awarded

against the polluting parties; and that the Plaintiff has joined all parties necessary to a complete adjudication, on the merits, of Plaintiff's claim for damages arising from the massive pollution of the Back River as a direct and proximate result of the actions and inactions of the Defendants.

A memorandum in support of this response is being filed contemporaneously herewith.

ROY E. DAVIS, Individually and Trading as ROY E. DAVIS SEAFOOD

/s/ James E. Bradberry
Of Counsel

/s/ James E. Bradberry
MOORE, MOORE & BRADBERRY
13185 Warwick Boulevard
Newport News, Virginia 23602

C E R T I F I C A T E

I hereby certify that a true and correct copy of the foregoing Response to Motion to Dismiss was this 5th day of

April, 1982 mailed to all counsel of record.

/s/ James E. Bradberry
MOORE, MOORE & BRADBERRY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ROY E. DAVIS, ETC.,

Plaintiff,

v. CIVIL ACTION NO.: 80-202-NN

UNITED STATES OF AMERICA, ETC., ET AL.,

Defendants.

MEMORANDUM ORDER

Plaintiff operates a seafood business in Back River, a tributary of the Chesapeake Bay. As a part of this business, plaintiff purchases polluted clams and transplants the clams from polluted water to Back River where the clams are cleansed. The area of river bottom used by plaintiff is leased by plaintiff from the Commonwealth of Virginia. Prior to the commencement of this action, the Virginia State Health Department closed Back River to the harvesting of shellfish due to the discharge of untreated

sewage into Back River. Plaintiff has instituted this action against the United States and the City of Hampton, asserting that it was their discharge of sewage into Back River that caused the closing of Back River to shellfishing. The defendants have filed motions to dismiss, asserting several bases for the motion. The Court need address only the United States' motion to dismiss for failure to state a claim upon which relief may be granted.

Plaintiff asserts in his complaint that the pollution of Back River by defendants is in violation of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. Plaintiff also asserts that the City of Hampton's actions are in violation of Virginia law. Because of the injury he has suffered as a result, he seeks damages of $321,852.00,

recovery of attorney's and witness fees, and issuance of a permanent injunction prohibiting defendants from polluting the Back River.

The Supreme Court has recently decided what rights are conferred on private citizens by the Federal Water Pollution Control Act. Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 101 S. Ct. 2615 (1981). In Middlesex the Court ruled that the FWPCA conferred no private right of action independent of the citizen suit provisions of the Act. The citizen suit provision, 33 U.S.C. § 1365, permits suit against any person who is alleged to be in violation of a standard or limitation promulgated under the Act. 33 U.S.C. § 1365 (a). "This provision... authorized only prospective relief, and the citizen plaintiffs first must give notice to the

EPA, the State, and any alleged violator." 101 S. Ct. at 2619. Plaintiff's claims under the FWPCA fail in two respects. First, the complaint does not state that plaintiff served the requisite notice. Second, the claim fails because the FWPCA confers no right to recover damages; the only remedies available are those provided by the Act. 101 S. Ct. at 2625. Under the rule of Middlesex, plaintiff's claims under the FWPCA against the United States and City of Hampton must be dismissed.

Despite the rule of Middlesex, plaintiff argues that he may still succeed in this action. Plaintiff would read Middlesex as limited to those situations in which a private right of action is asserted under the FWPCA. In plaintiff's view, Middlesex does not affect actions brought under the Federal Tort

Claims Act. 28 U.S.C. § 1346.

There are two problems with plaintiff's theory. First, plaintiff is seeking to recover for a tort based upon the violation of effluent standards established pursuant to the FWPCA. Effectively, plaintiff is seeking to enforce the FWPCA, despite Middlesex, through a private right of action. In view of the Supreme Court's holding in Middlesex, especially the Court's discussion of the Act's saving clause , 33 U.S.C. § 1365(e), to accept plaintiff's theory would fly in the face of Middlesex. The Federal Tort Claims Act cannot be used to circumvent the scheme of the FWPCA. This conclusion is buttressed by the second flaw in plaintiff's theory. In City of Milwaukee v. Illinois, 101 S. Ct. 1784 (1981), the Supreme Court held that the FWPCA has superseded the federal common

law of nuisance. Were plaintiff permitted to bring a nuisance action based upon a violation of the FWPCA under the Federal Tort Claims Act, not only would Middlesex be circumvented, but a federal common law of nuisance would be re-established--through the use of the very statute that supplanted the common law with a statutory scheme. The Federal Tort Claims Act cannot be used to cause such an incongruous result.

Having dismissed all plaintiff's claims against the United States, the Court now turns to plaintiff's remaining claims against the City of Hampton. All of plaintiff's remaining claims against the City of Hampton are matters of state law. As the United States is no longer a party, and there are no remaining federal causes of action, this Court will decline to retain jurisdiction over

plaintiff's state law claims. Plaintiff's state law claims are dismissed without prejudice.

The Clerk is directed to enter an appropriate order.

It is so ORDERED.

Dated at Norfolk, Virginia, this 13th day of April, 1982.

/s/ John A. MacKenzie
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 82-1423

ROY E. DAVIS, Individually and
Trading as ROY E. DAVIS SEAFOOD,

Appellant,

versus

UNITED STATES OF AMERICA and its
Agency the United States Air Force
and
The City of Hampton, a political
subdivision of the Commonwealth
of Virginia,

Appellees,

and

Hampton Roads Sanitation District,

Third-Party Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, District Judge.

Argued: January 11, 1983

Decided: September 14, 1983

Before PHILLIPS and CHAPMAN, Circuit Judges; and FIELD, Senior Circuit Judge.

James E. Bradberry (D. Wayne. Moore, Moore, Moore and Bradberry on brief) for Appellants; Janet L. Steckel, Dept. of Justice (Carol E. Dinkins, Assistant Attorney General; Elsie Munsell, United States Attorney, John F. Kane, Assistant United States Attorney; Kirk D. Snel, Dept. of Justice on brief) for Appellee.

PER CURIAM:

This is an appeal by Roy E. Davis from a final judgment of the district court dismissing his complaint under the Federal Tort Claims Act. 28 U.S.C. S 1346(b), and 2671 et seq., seeking damages against the United States resulting from the alleged violation by Langley Air Force Base of the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq. The relevant facts are summarized as follows.

The plaintiff operated a seafood business in Back River, a tributary of the Chesapeake Bay. Incident to this business, the plaintiff purchased polluted clams and transplanted them in the Back River where the clams were cleansed. The area of the river bottom used by the plaintiff was leased from the Commonwealth of Virginia. Prior to the com-

mencement of this action the Virginia State Health Department closed Back River to the harvesting of shellfish due to the discharge of untreated sewage into the river. In his complaint filed against the United States and the City of Hampton, Virginia, the plaintiff asserted that it was their discharge of sewage which caused the closing of the river.

Prior to the institution of this action, Davis had filed a complaint against the Air Force and the Environmental Protection Agency under the citizen suit provision of the FWPCA, 33 U.S.C. § 1365, alleging violations of the Act and seeking enforcement of the statute. In the course of this litigation the EPA determined that the Air Force had made substantial and good faith efforts to comply with the requirements

of the FWPCA, and ultimately a consent decree was entered dismissing the enforcement action. In the decree Davis stated that he found the actions of the EPA to be "adequate and reasonable based on current circumstances", and the action was dismissed by an order which, among other things, approved the payment of attorney fees and costs to Davis' counsel in that litigation.

Prior to the dismissal of the enforcement action, Davis had filed his complaint in the present case on October 27, 1980. Thereafter, both the United States and the City of Hampton filed motions to dismiss which motions were granted by the district court. The basis for the dismissal of the action against the United States was the failure of the plaintiff to state a claim upon which relief could be granted, and since the

federal cause of action were eliminated, the district court also dismissed without prejudice Davis' pendant claims against the City of Hampton.

In dismissing the action against the United States, the district court relied upon Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1 (1981), in which the court held the FWPCA conferred no private cause of action independant of the citizens suit provisions of the Act. The plaintiff, however, contended in the district court, as he does here, that Middlesex does not apply to actions brought under the Tort Claims Act. The district judge rejected this theory, stating that, in effect, the plaintiff was seeking to enforce the FWPCA through a private cause of action. We agree with the district judge that the Tort Claims Act cannot be

used to circumvent the legislative scheme of the FWPCA as recognized and interpreted by the court in Middlesex. The complaint in this action posits the right of recovery solely on the FWPCA and contains no allegations of negligence or wrongful conduct on the part of the United States other than the alleged violations of the Act. Absent such allegations, the district court correctly held that the plaintiff had failed to state a claim upon which relief could be granted. We are further of the opinion that consequent dismissal of the pendant claims against the City of Hampton was appropriate.

Accordingly, the judgment of dismissal is affirmed.

AFFIRMED

STATUTORY APPENDIX

28 U.S.C. 1331
(at time of suit)

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in conroversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) * * *

(as amended)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1346(b)

Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. 2680

The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of

any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 [46 USCS §§ 741 et seq.], relating to claims or suits in admirality against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix [50 Appx USCS §§ 1 et seq.].

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misre-

presentation, deceit, or interference with contract rights: Provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary

system.

(j) Any claim arising out of the combatent activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennesse Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

33 U.S.C. 1365-Citizen Suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf-

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order,

or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS § 1319].

(b) Notice. No action may be commenced-

(1) under subsection (a)(1) of this section-

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require com-

pliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act[33 USCS §§ 1316, 1317(a)]. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention be Administrator. (1) Any action respecting a violation by a charge discharge source of an

effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section, may award cost of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not

restricted. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief against the Administrator or a State agency).

(f) * * *

(g) Citizen. For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) * * *

Title 21, Code of Virginia

Section 218- Discharge into tidal waters of matter causing pollution.- No county, city, town or other public body, or person shall discharge, or suffer to be discharged, directly or indirectly into any tidal waters of the district any

sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any tidal waters of the district any sewage, industrial wastes or other refuse which may or will cause or contribute to pollution of any tidal waters of the district, provided, that this provision shall be applicable only to such part or parts of the tidal waters of a district as shall be bounded and described in a notice, published in a newspaper or newspapers having, in the aggregate, general circulation in all of the counties and cities within which or bordering upon which such part or parts of the tidal waters of the district are located, to the effect that the commission has provided facilities reasonably sufficient in its opinion for the disposal of sewage, which by discharge from public sewer systems might cause or con-

tribute to pollution of the bounded and described part or parts of such tidal waters, and that pollution of the same is forbidden by law. Such a notice shall constitute prima facie evidence of the existence of facilities sufficient for the disposal of such sewage. The provisions of this section shall not prohibit the disposal of sewage and industrial wastes in the manner in which the same is now being disposed of, or in any other reasonable manner, by any county, city, or town, no part of which constitutes a part of any district, or by any person in any such county, city or town, no part of which constitutes a part of any district.

Section 223- Punishment of violations. - Any person violating any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be

punished accordingly.

Title 62.1, Code of Virginia Section 44.3(6)Definitions. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as well as or likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (i) any alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself

is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution" for the terms and purposes of this chapter.

Section 44.5-Public policy regarding waste discharges or other quality alterations of state waters.- It is hereby declared to be against public policy for any owner who does not have a certificate issued by the Board to (1) discharge into state waters inadequately treated sewage, industrial wastes, other wastes, or any noxious or deleterious substances, or (2) otherwise alter the physical, chemical or

biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses.

Office - Supreme Court
FILED
MAR 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1241

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROY E. DAVIS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

DIRK D. SNEL
JANET L. STECKEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court properly dismissed petitioner's action under the Federal Tort Claims Act for damages to compensate for the government's alleged violation of the Clean Water Act's pollutant discharge restrictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1241

ROY E. DAVIS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-44a) is reported at 722 F. 2d 1157. The opinion of the district court (Pet. App. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeal was entered on September 14, 1983. The petition for a writ of certiorari was filed as of December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b), originally enacted as part of the Federal Tort Claims Act, and portions of Section 505 of the Clean Water Act, 33 U.S.C. 1365, are set forth at Pet. App. 31a-32a, 34a-37a.

STATEMENT

1. Petitioner instituted this action in the United States District Court for the Eastern District of Virginia in October 1980. He sought damages against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 28 U.S.C. (& Supp. V) 2671 *et seq.*, for alleged violations of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, by the United States Air Force at Langley Air Force Base in Virginia. Petitioner buys polluted clams and transplants them from polluted waters to the Back River in Virginia where the clams are cleansed and resold. Langley Air Force Base, which fronts on the Back River, operates a sewage collection system and pumping facility through which sewage and wastes are pumped into sewage lines owned and operated by the Hampton Roads Sanitation District, also a defendant in the district court. Pet. App. 31a-32a, 40a-41a.

2. On June 22, 1979, the United States Environmental Protection Agency (EPA) issued a notice of violation and order for compliance to Langley Air Force Base. EPA found that in recent years because of increased pressure during heavy rains, Langley had been unable to pump all of its sewage into the Sanitation District's system, resulting in sewage overflow in violation of the Clean Water Act.[1] EPA's order directed Langley to identify the causes of past releases of untreated sewage and to plan preventive actions. It also required Langley to submit to EPA and the Virginia State Water Control Board a schedule for expeditious compliance with Virginia's sewage regulations. Langley notified EPA of the actions it was taking to alleviate the

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[1] We are lodging with the Court a separate addendum of documents that were filed in *Davis* v. *United States*, No. 79-113-NN (E.D. Va), the companion case to the instant action. The EPA orders, as well as pleadings and orders in No. 79-113-NN, may be found in the addendum.

problem. However, Langley noted that it was having difficulty pumping sewage into the Sanitation District's force main because of high pressures in the main that caused overloading and resulted in untreated discharges. Langley also asserted that other point-source discharges from Hampton contributed to sewage discharges into the Back River.

Prior to the commencement of the present action, petitioner had filed another suit in the Eastern District of Virginia (No. 79-113-NN) against the Air Force and the EPA, invoking the "citizen suit" provision in Section 505 of the Clean Water Act, 33 U.S.C. 1365. Thereafter, the Commonwealth of Virginia intervened as a plaintiff in No. 79-113-NN, naming Langley, the Sanitation District, and the Cities of Hampton and Newport News as defendants and alleging violations of the Clean Water Act. The Commonwealth agreed to dismiss its suit after an adequate program commenced for elimination of infiltration and inflow.

On December 2, 1980, the EPA issued an extension order to Langley. It found that Langley had made a substantial and good faith effort to comply with the June 22, 1979 order and the requirements of the Clean Water Act. Beause of the corrective actions taken by Langley, Hampton and other users of the Sanitation District's system, the agency found that no overflow had occurred since December 1979. EPA therefore extended the time for Langley to achieve complete compliance. As a result of these actions by EPA, on January 27, 1981, petitioner entered into a consent decree with EPA and the Air Force to dismiss No. 79-113-NN. In this consent decree, petitioner expressly concurred that the actions of the EPA were "adequate and reasonable based on current circumstances." The consent decree further stated that it should not be construed to be an admission of

liability by any agency of the United States. Consequently, the district court entered an order dismissing No. 79-113-NN.

3. While No. 79-113-NN was still pending petitioner filed the present complaint against the United States and the City of Hampton (Pet. App. 2a-13a). With respect to the United States, the new complaint alleged the same violations of the Clean Water Act by Langley—the discharge of untreated sewage into the Back River—that were asserted in No. 79-113-NN. These violations of the Act, the complaint alleged, caused the closing of Back River by the Commonwealth of Virginia and therefore of petitioner's shellfish business (Pet. App. 4a-6a, paras. 7, 9, 11). As a result of this alleged breach by the United States of its supposed duty not to injure petitioner by a "wrongful discharge of sewage into a navigable river in violation of the [Clean Water Act]"[2] (Pet. App. 6a, paragraph 11), petitioner claimed $321,852 as damages against the United States pursuant to the Tort Claims Act as compensation for his loss of business (Pet. App. 2a-3a, 11a, para. 22).[3]

The United States moved to dismiss the complaint. The district court granted the motion, relying on only one of the several grounds urged by the government—that the complaint failed to state a claim upon which relief could be granted (Pet. App. 32a).[4] The district court held that

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[2]Petitioner refers to the Clean Water Act as the Federal Water Pollution Control Act. Both designations may properly be used to describe the Act. See Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566.

[3]Petitioner had previously submitted an administrative claim for damages as required by the Tort Claims Act. The Air Force denied the tort claim on May 6, 1980 (Pet. App. 7a-8a), on the ground that there was no negligence in the discharge of untreated sewage.

[4]Thus, petitioner is incorrect when he asserts (Pet. 9-10) that the court dismissed the case because it lacked "tort jurisdiction."

petitioner's action for damages under the Tort Claims Act, based upon a violation of the Clean Water Act, was barred by *Middlesex County Sewerage Authority* v. *National Sea Clammers Association (Sea Clammers)*, 453 U.S. 1 (1981), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). The district court noted that *Sea Clammers* and *Milwaukee* held that the citizen suit provision of Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), is the exclusive remedy for private citizens for violations of that Act, and preempts private claims under federal common law or statute (Pet. App. 33a-36a). Since all claims against the United States were dismissed, eliminating the federal causes of action, the court also dismissed without prejudice petitioner's pendent claim against the City of Hampton (*id.* at 36a-37a).

4. The court of appeals affirmed (Pet. App. 38a-44a). It agreed with the district court that petitioner was, in the guise of a federal tort claim, seeking a private remedy for violation of the Clean Water Act, a course barred by *Sea Clammers*. Since petitioner's complaint based the right of recovery solely on Clean Water Act violations, and contained no allegations of negligence or wrongful conduct other than Clean Water Act violations, the court of appeals held that the district court correctly dismissed the action for failure to state a claim (Pet. App. 43a-44a).

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner seeks to have this Court decide an issue that was not raised by his complaint and was not decided by the lower courts. Petitioner concedes (Pet. 9-12), as he did below, that this Court's decision in *Sea Clammers* bars any private cause of action to remedy violations of the Clean

Water Act other than actions properly brought under the citizen suit provision of Section 505(a) of that Act, 33 U.S.C. 1365(a). Petitioner argues, however, that *Sea Clammers* did not eliminate "separate, independent and long standing remedies for damage caused by the tortious misconduct of the government" under the Tort Claims Act (Pet. 12-13), and asserts that his claim was not based on violations of the Clean Water Act, but on *negligent* pollution of the Back River (*id.* at 12-14). This is incorrect.

Petitioner's complaint did not allege any negligent action cognizable under the Virginia common law of tort. His federal tort claim was based solely on "the wrongful discharge of sewage into a navigable river *in violation of the [Clean Water Act]*" (Pet. App. 6a (emphasis added)). This was the allegation that the district court (Pet. App. 32a) and court of appeals (*id.* at 40a, 44a) addressed.[5]

2. As a result of his change in tactics petitioner apparently does not challenge the holdings made below that this Court's decisions in *Sea Clammers* and *Milwaukee* stand as a bar to his action based on violations of the Clean Water Act. The concession is compelled. "The establishment [in the Clean Water Act] of such a self-consciously comprehensive program" for the regulation of water pollution was intended by Congress to preempt any private right of action under federal common law to remedy any matter addressed

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[5]It is doubtful that petitioner could have asserted a negligent tort against the government. The government denied petitioner's administrative claim for damages because it found that whatever pollution may have occurred was not due to the negligent operation by Langley of its sewage pumping facilities. A federal tort claim must be based on a claim of negligent conduct by government employees, as opposed to other, non-negligent, torts such as the creation of a nuisance. See 28 U.S.C. 1346(b), 2674; *Flanagan* v. *Gregory and Poole, Inc.*, 136 W. Va. 554, 562, 67 S.E. 2d 865, 871 (1951) (defining nuisance as the violation of an absolute duty, which may occur when the best of care is taken).

by the Act. *City of Milwaukee* v. *Illinois*, 451 U.S. at 319, 320. *Sea Clammers*, like the instant case, was a suit for damages to remedy violations of the Clean Water Act. This Court held (453 U.S. at 14) that recovery of damages for violations of the Act was not permitted:

> In view of the elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the Clean Water Act].

The Court there also considered, sua sponte, an alternative statutory basis for the recovery of damages for violations of the Act—42 U.S.C. (Supp. V) 1983, which authorizes recovery of damages against state officials for civil rights violations.[6] The Court found that recovery of damages was barred for violations of the Clean Water Act under 42 U.S.C. (Supp. V, 1983 or any other statute. 453 U.S. at 20-21.[7] Thus, it is beyond dispute that petitioner may not pursue an action under the Tort Claims Act seeking compensation for the government's alleged violation of the Clean Water Act.[8]

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[6]See *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

[7]Petitioner correctly notes (Pet. 14) that Tort Claims Act recovery for Clean Water Act violations was not addressed in *Sea Clammers* because the federal tort claim was dismissed in the court of appeals as not timely. *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222, 1236 (3d Cir. 1980). However, given this Court's broad language in both *Milwaukee* and *Sea Clammers* regarding the preemptive nature of the Clean Water Act in matters involving the enforcement of its provisions, we cannot suppose a Tort Claims Act suit to remedy violations of the Clean Water Act would be treated differently from a civil rights suit under 42 U.S.C. (Supp. V) 1983.

[8]Petitioner contends (Pet. 18) that the same issue is raised in other actions pending in the district courts and that, therefore, his petition should be granted. Plaintiffs in *Kelley* v. *United States*, No. 79-10199 (E.D. Mich.) did raise a claim similar to petitioner's, but it was resolved by a consent decree. In *Dickerson, Inc.* v. *American Electric Corp.*, No. 82-244-Civ-J-B (M.D. Fla.), plaintiffs claimed damages against the

This result is not altered by the savings clause in Section 505(e) of the Clean Water Act, 33 U.S.C.1365(e), referred to by petitioner (Pet. 15-17), which states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief against the Administrator or a State Agency).

Petitioner's contention conflicts with this Court's decisions in *Milwaukee*, 451 U.S. at 328-329 and *Sea Clammers*, 453 U.S. at 20-21 n.31. Actions preserved by Section 505 are for enforcement of *other* "anti-pollution standards arising under *other* statutes or state common law," but not other *remedies* for the enforcement of the Clean Water Act. *Sea Clammers*, 453 U.S. at 20 n. 31.[9]

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private defendants for violating the Clean Water Act. But the claim against the United States was a federal tort claim for damages based on the government's alleged negligence. Therefore, *Dickerson* does not involve precisely the same issue presented here.

[9] *Hough* v. *Marsh*, 557 F. Supp. 74 (D. Mass. 1982), cited by petitioner (Pet. 13), does not present a square conflict with the lower court rulings here. There, plaintiffs sought review under the Administrative Procedure Act (APA), 5 U.S.C. 701-706, of a decision by the Corps of Engineers to issue a permit, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. (Supp. V) 1344, to a party seeking to deposit landfill in a wetland. The court correctly held the action under the APA should not be dismissed because of the preemptive effect of the Clean Water Act's citizen suit provision. It found that Section 505 had no application to review of agency action under Section 404. And it noted that, while Section 505(a)(2) (33 U.S.C. 1365(a)(2)) does permit actions to compel performance of nondiscretionary agency duties, issuance of a Section 404 permit was a discretionary function, properly reviewable under the APA. 557 F. Supp. at 78. The court also stated that the Clean Water Act's citizen suit provision did not preempt an APA action because, under *Sea Clammers*, the savings clause preserved actions under other

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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laws, such as the APA. 557 F. Supp. at 78-79. As we demonstrate above, this portion of its ruling was incorrect. However, that error is of little consequence here since the court's alternative ground for decision was correct.

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